

**BEFORE**  
**THE COPYRIGHT ROYALTY JUDGES**  
**LIBRARY OF CONGRESS**  
**WASHINGTON, DC**

In re

Distribution of 2010-2013  
Cable Royalty Funds

Docket No. 14-CRB-0010-CD (2010-2013)

Consolidated with:  
Docket No. 14-CRB-0011-SD (2010-2013)

**RESPONSIVE BRIEF OF CANADIAN CLAIMANTS GROUP**  
**TO**  
**THE JUDGES' JUNE 29 ORDER SOLICITING FURTHER BRIEFING**

Pursuant to the Copyright Royalty Judges' ("Judges") Order dated June 29, 2018, Soliciting Further Briefing (the "June 29 Order"), the Canadian Claimants Group ("CCG") hereby submits its responsive brief.

**I. INTRODUCTION**

In the June 29 Order, the Judges directed the parties to address the question:

Whether the interrelationship between and among the Basic Fund, the 3.75% Fund, and the Syndex Fund affects the allocations within the Basic Fund, if at all, and, if so, how that affect should be calculated and quantified.

In response, all Allocation Phase parties submitted briefs on July 16, 2018, some with supporting affidavits, addressing this question.

The CCG responds to the arguments by Joint Sports Claimants (“JSC”) and Settling Devotional Claimants (“SDC”), that the adjustment proposed by Public Television Claimants (“PTV”) is only available if shares are based on the Bortz Survey.<sup>1</sup> The CCG also responds to those arguments by Program Suppliers (“PS”) that the adjustment is not warranted under any circumstances.<sup>2</sup>

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<sup>1</sup> “If the Judges predicate the Basic Fund allocations on the Bortz Surveys, as in the 2004-05 proceeding, PTV should receive a nonparticipation adjustment in its Bortz shares and thus in its Basic Fund allocation. If the Judges adopt a different methodology, PTV should not receive any adjustment in its Basic Fund allocation.” Joint Sports Claimants’ Response to Order Soliciting Further Briefing, at 2. “In short, to the extent the Bortz methodology is the predominant methodology for allocating all shares in this case, then some modest adjustment to the PTV share of the Basic Fund, as calculated by Mr. Trautman in Table 10 to his rebuttal testimony, would be reasonable and supported by prior decisions and record evidence. The impact would be modest, and would not materially affect the Devotional share. There is no basis in the record or in prior decisions for an adjustment of the Basic Fund or an allocation of the 3.75% Fund under any other methodology presented.” Settling Devotional Claimants’ Brief in Response to Order Soliciting Further Briefing on Allocation (“SDC Brief”), at 9-10.

<sup>2</sup> “Accordingly, regardless of what distribution methodology the Judges ultimately adopt, Program Suppliers do not support the Basic Fund adjustment sought by PTV in this proceeding to address PTV’s non-participation in the 3.75% and Syndex Funds.” Program Supplier’s Memorandum of Law Responding to Order Soliciting Further Briefing (“PS Brief”), at 2-3.

CCG also objects to the post hoc efforts to recharacterize the Horowitz Survey, Israel Econometric Study, Crawford Econometric Study, and Gray Viewing and Volume studies as somehow related only to the Basic Fund.<sup>3</sup>

The CCG concludes that the distinctions between the 3.75% and Basic Funds are irrelevant when shares are based on any study or combination of studies that purport to determine shares of all royalties and therefore, if the Judges use such a study or studies to determine the share of PTV or any other claimant, the proposed adjustment is proper.

## **II. DISCUSSION**

### **A. The distinction among the funds is not as clear as the parties suggest.**

As an initial matter, it is important to define the three “funds” at issue in this Allocation Phase proceeding. The Copyright Office’s Statements of Account (SOAs) provide a mechanism by which each cable system calculates royalties depending upon the size of the system. The smallest systems, referred to as Form 1 systems, pay a flat rate to retransmit royalties. Medium sized systems referred to as Form 2

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<sup>3</sup> “[T]he Gray Study and the Horowitz Survey were both designed to calculate the relative market values of all of the different programming categories at issue in this proceeding, and are not based on the statutory licensing rate formula. Accordingly, the Gray Study shares and the weighted Horowitz Survey shares should be applied to the Basic Fund, because that is the royalty fund in which all of the program categories at issue in this proceeding participate.” PS Brief, at 7-8. “As to the regression analyses presented in this case, none provides any evidence to support the PTV upward adjustment. Both the JSC and CTV fee-based regression methodologies include control variables for systems or subscriber groups retransmitting a 3.75% signal.” SDC Brief, at 8.

systems, pay a rate based on the revenues of the system but without regard to the number or type of retransmitted signals. The largest systems, Form 3 systems, pay royalties based on a combination of the systems' gross receipts and the number and type of retransmitted distant signals. Form 3 systems paid 98.6% of all royalties in 2010 through 2013. Ex. 4009 at 2 (Martin CCG Direct).

Form 3 systems pay one or more of the following four types of royalties based on the number of DSEs they retransmit: (1) the Base Rate fee, (2) the 3.75 Fee, (3) the Minimum Fee, and, (4) the Syndicated Exclusivity Surcharge ("Syndex Fee"). Once a cable system calculates each of these fees, it pays the Syndex Fee plus the greater of the Minimum Fee or the sum of the Base Rate and 3.75 Fees. Ex. 4009 at 3 (Martin CCG Direct).

It is the CCG's understanding that when the Copyright Office collects royalties from all cable systems, it allocates Syndex Fees identified on Form 3 SOAs into a "Syndex Fund," the 3.75% fees identified on those same Form 3 SOAs into a "3.75% Fund," and all other royalties (Form 1 and Form 2 royalties, Form 3 Base Rate royalties, and Form 3 Minimum Fees, if any) into a "Basic Fund." The final awards of the CRB allocate the royalties from these "funds." *See Copyright Royalty Board, Distribution of the 2000-2003 Cable Royalty Funds*, 75 Fed. Reg. 26798, 26798-99 (May 12, 2010).

The Syndex Fund has essentially become irrelevant to the Judges' question and indeed these proceedings because the total Syndex Royalties collected in 2010-

2013 were less than \$67,000 and amounted to less than 0.01% of royalties for the four years. In any event, by prior precedent and agreement among the parties, the Syndex royalties have generally only been distributed to PS and Music Claimants (and National Public Radio, to the extent its share comes “off the top.”) This means the Judges’ question and the arguments offered really bear on the Basic Fund and the 3.75% Fund.

In looking at those two funds, it is important to recognize that the delineation between the 3.75% Fund and the Basic Fund used by the Copyright Office is an artificial bright line. The division of royalties into the two funds is in part arbitrary because the designation of signals as 3.75 Fee signals on the SOAs is itself arbitrary. Jonda Martin explains this at length in her testimony for the CCG. *See* Exhibit 4009 (CCG Martin Direct) at 12-13. In that testimony, Ms. Martin shows the effect of this arbitrary designation on US independent signals compared to Canadian independent signals. But, the issue holds true for all signals that could liable for the 3.75 Fee and no evidence was offered on this issue for all signals. Therefore, even the basis for contending that the Judges should strictly allocate royalties by “fund” is suspect because the delineations of the “funds” are themselves arbitrary.

**B. Historic distinctions between the funds are not relevant to the allocation process if the final shares are based comprehensive studies rather than on criteria specifically related to the individual royalty funds.**

PS argue “that the Basic, 3.75%, and Syndex Funds are each legally separate and distinct royalty funds, and participation in the royalties deposited for each of

these three funds is limited to the specific claimant categories whose works are eligible to participate in the particular royalty fund.” PS Brief, at 1. As noted above, the distinction between the 3.75% and Basic Funds are not as factually clear as PS suggest.

PS overlook this factual problem and instead rely on a legal distinction arising in the Copyright Royalty Tribunal’s (the “Tribunal”) decision regarding the 1983 cable royalties. There, in distinguishing its treatment of the 3.75% fund, the Tribunal wrote “the factual and legal circumstances underlying the distant carriage of broadcast stations at the 3.75% rate are sufficiently different from the facts and law underlying the distant carriage of broadcast stations at the statutory rate to justify creating separate fund [sic] and making different allocations from those made for the basic fund.” Copyright Royalty Tribunal, *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792, 12813 (April 15, 1986); *see also* 51 Fed. Reg. at 12807 (“The Tribunal concludes that there are different factors underlying the royalties which derive from the statutory rates, the 3.75% rate, and the syndicated exclusivity surcharge, and that this justifies dividing the 1983 cable royalty fund and making three separate allocations.”). The record in that case included substantial information on the then new 3.75% fund including (a) “MPAA’s special Nielson study, [where] viewing data was broken out for those broadcast stations in the survey which were carried at 3.75%”; (b) JSC’s special analysis of the 3.75% fund; and (c) NAB’s breakout of an attitudinal survey between respondents

with and without 3.75% fee signals. *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. at 12804. With the record before it, the Tribunal established separate awards for the three funds.

Regarding the 3.75% Fund, the 1989 Tribunal noted only “No evidence was introduced in this proceeding to challenge these earlier [1983] conclusions.” Copyright Royalty Tribunal, *1989 Cable Royalty Distribution Proceeding*, 57 Fed. Reg. 15286, 15303 (April 27, 1992).

The Tribunal’s successors also made separate awards but evidence for distinguishing between the funds in subsequent proceedings became less common and less useful. The 1990-1992 Copyright Arbitration Royalty Panel (“CARP”) shed little light on the proper treatment of the 3.75% fund, saying only: “The 3.75% fund established a royalty rate of 3.75% of gross receipts for newly permitted distant signals. Little new argument is made concerning its distribution. PTV is not a participant in this fund. We make these awards in a similar basis as the Tribunal in 1989. The allocations are as follows: Program Suppliers 58.6%, JSC 32.6%, NAB 7.5%, Devotionals 0.95% and Canadians 0.35%.” *Copyright Arbitration Royalty Panel Majority Report Re Cable Royalties for the Years 1990-1992* (May 31, 1996) (“1990-92 CARP Report”) at 142. The Librarian of Congress’ review of the CARP decision summarized this three-sentence discussion well: “The Panel’s discussion of its division of the 3.75% Fund is, at best, terse.” Library of Congress, *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55662 (Oct. 28, 1996).

The 1998-1999 CARP had hardly any evidence to work with noting “JSC concedes ‘the paucity of evidence concerning the distribution of the 3.75% Fund in this proceeding’” and finding that PS had “presented an inadequate case for receiving a 3.75% Fund share that is disproportionately larger than its Basic Fund share.” *Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress* (Oct. 21, 2003) (“1998-1999 CARP Report”), at 91. However, that Panel went on to allocate the 3.75% fund the same way as the Basic fund after “making mathematical adjustments to account for the Devotionals stipulated 3.75% Fund award, our determination of Music’s net share, *PTV’s non-participation*, and Canadians fee-generated 3.75% award.” *Id.* at 91-92 (emphasis added). This represented a turning point.

The 2004-2005 decision of the Copyright Royalty Judges followed the 1998-1999 CARP’s adjustment for PTV with almost no discussion other than a reference to the adjustment to the Bortz results performed by Ms. Linda McLaughlin. Copyright Royalty Board, *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg 57063, 57070 (Sept. 17, 2010).

This tortured legal history hardly establishes a clear precedent regarding PTV’s proposed adjustment. However, the limited explanation provided by the 1998-99 CARP does provide insight into why it endorsed the adjustment: “The adjustment makes sense in the context of a CSO survey where the respondents are allocating a fixed budget among the various claimant groups - unless JSC can



demonstrate that the respondents already understood that PTV does not participate in the 3.75% Fund.” *1998-1999 CARP Report*, at 26 n. 10. Of course, the CARP was referring to the Bortz CSO survey and on that basis some parties in this proceeding argue that the adjustment is only valid for the Bortz survey. The 1998-99 CARP continued “The Panel believes the 1989 CRT and 1990-92 CARP did not fully appreciate the logic supporting this adjustment. It is precisely because the Bortz respondents did not answer based on their actual royalty payments and presumably did not know that PTV would not be eligible to receive part of their budget allocation that the adjustment is warranted. *1998-1999 CARP Report*, at 26 n. 10.

In both the Bortz and Horowitz surveys, the respondents are asked to allocate royalties among the programming categories. Respondents are given no information about which categories do or do not participate in which funds. So, when a respondent provides its response, it is applicable to all royalties paid. If the results are that survey respondents say that JSC gets X percent, that would be a share of total royalties. The same holds if the survey respondents say that PTV gets X percent. The surveys, which purport to allocate total royalties, provide no basis for penalizing PTV because cable systems do not pay 3.75% royalties for educational systems. At a minimum, the PTV adjustment applies to both the Bortz and Horowitz studies because neither provides fund-specific valuations.

The rationale supporting the PTV adjustment in Bortz and Horowitz, however, is more broadly applicable. The key feature of the Bortz and Horowitz surveys—

producing shares of total royalties without reference to funds—is also found in the evidence provided by Dr. Gray, Dr. Israel, Prof. Crawford and Prof. George.

The Gray viewing and volume studies provide valuations that apply to all royalties. None of Dr. Gray's valuation tables purported to show a split between the 3.75% Fund and the Basic fund. Neither viewing nor volume were modified or adjusted to provide separate data about viewing or volume on 3.75% signals. Dr. Gray now argues that his approach only applied to the Basic Fund because that is the only one in which all claimants participate. PS Brief, Appendix A at 2. This *post hoc* rationalization that Dr. Gray's study applied only to the Basic Fund was not asserted during the hearings and is new factual evidence which must be rejected because it is not subject to discovery, rebuttal and cross examination. Even if it were not inadmissible new evidence, it is completely inconsistent with the underlying theory of Dr. Gray's written testimony. In his written testimony submitted during the hearing, Dr. Gray concluded: "Table 2 [the viewing data] above reports each claimant category's distant viewing share and *therefore its share of the total 2010-2013 Cable Royalties for each royalty year*. Ex. 6036 at 20 (emphasis added). Dr. Gray's new declaration cannot be used to retcon his prior testimony.

Similarly, the economic studies by Dr. Israel, Prof. Crawford and Prof. George were never presented as applying only to the Basic Fund. These experts presented evidence they claimed showed the relative market value of programming as a share of all royalties. CTV, who introduced Prof. Crawford's study endorses an adjustment

for PTV recognizing that these global studies apply to all royalties. JSC though opposing such an adjustment (unless Bortz is used) at least does not now argue that Dr. Israel's results were by design limited only to the Basic Fund. Dr. George's study, while only providing a royalty share for the CCG still provides those shares as a percentage of total royalties. Thus, all of the econometric regressions are intended to derive a share of total royalties.

What JSC, PS, and SDC seek to do by opposing the PTV adjustment entirely or limiting it to Bortz only (rather than recognizing it logically applies to all comprehensive studies) is impose a fee-gen based cap on the value of PTV programming without any testimony to support such a cap. The overwhelming evidence in this proceeding has shown that CSOs value programming in a manner that is not closely tied to signal valuation. As Prof. Lisa George noted in her testimony, the value of a signal can even be depressed because CSOs do not want or need some categories of programming found on the signal. Ex. 4005 at 29. Programming value is not signal value. And, even if it were, the three "funds" do not cleanly tie to signals.

### **III. CONCLUSION**

Despite the argument of PS, JSC and SDC, there is no factual bright line between the Basic Fund and the 3.75% Fund, as explained in the testimony of Jonda Martin. Moreover, the Basic Fund itself consists of Form 1 and Form 2 royalties as

well as Minimum Fee royalties from systems with no distant signals. Trying to limit PTV's participation to the Basic Fund based on signal carriage simply cannot be fairly done.

Further, the PTV adjustment is not logically limited to the Bortz results, but rather applies equally to any other comprehensive study that purports to allocate shares of all royalties. Finally, without endorsing CTV's actual proposed shares, its calculation in section C of its brief shows that the PTV adjustment can be done even when several studies are combined to produce shares as long as those studies are not fund-specific.

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In sum, unless the Judges use a fund-specific allocation method that accurately ties to signal carriage—which cannot be found in the record evidence—the adjustment sought by PTV should apply. And, if PTV’s award is adjusted, this approach would need to be applied uniformly, so that each party’s cumulative awards are equal to the total share of royalties as determined by the allocation method used by the Judges.

Respectfully Submitted,

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/s/ L. Kendall Satterfield  
L. Kendall Satterfield  
DC Bar No. 393953  
Satterfield PLLC  
1629 K Street NW, Suite 300  
Washington, DC 20006  
Tel: 202-355-6432  
lksatterfield@satterfield-pllc.com  
Counsel for Canadian Claimants Group

Of Counsel,  
Victor J. Cosentino  
CA Bar No. 163672  
LARSON & GASTON, LLP  
200 S. Los Robles Ave, Suite 530  
Pasadena, CA 91101  
Telephone: 626-795-6001  
Fax: 626-795-0016  
victor.cosentino@larsongaston.com

# Proof of Delivery

I hereby certify that on Monday, July 30, 2018 I provided a true and correct copy of the Responsive Brief Of Canadian Claimants Group To The Judges' June 29 Order Soliciting Further Briefing to the following:

Joint Sports Claimants, represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

MPAA-represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Commercial Television Claimants (CTC), represented by John Stewart served via Electronic Service at jstewart@crowell.com

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

Signed: /s/ Lawrence K Satterfield